the subject matter of the temporary occupation licence nor anything which is attached to the land can be transferred or pass on intestacy. This is a judgment with which I respectfully agree. The law being such, it must be assumed that every contract of tenancy in respect of a house on State land contains an implied term that the tenancy is valid only for the duration of the landlord's licence to occupy the land. On the expiration of the landlord's licence either by effluxion of time or by the death of the licensee, the contract of tenancy must be deemed to have come to an end and the relationship of landlord and tenant extinguished. Therefore, once a tenancy ceases to exist the question of estoppel under section 116 of the Evidence Ordinance will not arise. It must also follow, in the circumstances of this case, that the legal representative of the estate of the deceased landlord cannot exercise the right to distrain under the Distress Ordinance since the relationship of landlord and tenancy has ceased to exist with the death of the licensee.

In the course of hearing, counsel for the administratrix confused the real issue by raising the question of attornment. The learned magistrate held that the tenant had accepted the appellant as landlord by attornment but that her act in permitting State land to be occupied was contrary to law. With respect, I do not think that the question of the legality of the contract or the application of law of estoppel arises in this case. If, however, the right to distrain for rent is based on the appellant's claim to be landlord by attornment, then she should have applied for the warrant of distress on her own right as landlord and not as administratrix of the estate of the deceased. It appears to me, therefore, that these proceedings are misconceived.

I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *D.A. Devadason; Sault, Keith Seller & Co.*

KEPONG MINES LTD. & ANOR. v. CHEE SING KAU

[F.C. (Azmi L.P., Suffian and MacIntyre F.JJ.) December 9, 1968]

[Johore Bahru—Federal Court Civil Appeal No. X19 of 1968]

Negligence — Highway — Accident — Employee suffering personal injuries as a result of negligence of driver of vehicle belonging to employer — Memorandum of agreement entered into under Workmen's Compensation Ordinance, 1952 — Payment of wages to employee — Whether this a bar to claim for damages under common law — Workmen's Compensation Ordinance, 1952, ss. 17 and 41.

Damages — Personal injuries — Jaw — Fracture — Contusion of bladder — Loss of teeth and lacerated wound.

Workmen's compensation — Payment of wages to employee — Whether bar to claim for damages under Workmen's Compensation Ordinance, 1952, ss. 17 and 41.

In this case the plaintiff-respondent had suffered personal injuries as a result of the negligent driving of a driver employed by the first appellants, who were his employers. An agreement had been entered into between the first appellants and the respondent whereby a sum of $292.72 was paid to the respondent. This although described as compensation represented the wages due to him. The respondent obtained damages against the appellants in the High Court. It was argued on appeal that because of the agreement entered into under the Workmen's Compensation Ordinance, the respondent was precluded from claiming common law damages against the appellants.

Held, dismissing the appeal: as what the respondent in this case received under the agreement was in fact wages and not a lump sum compensation he was not precluded from claiming damages under the common law.

Cases referred to:—

(1) *Lind* v. *Johnson* [1937] 4 All E.R. 201.

(2) *Popple* v. *Frodingham Iron & Steel Co.* [1912] 2 K.B. 141.

The following cases were also cited in argument: *Woodcock* v. *London & North Western Railway Co.* [1913] 3 K.B. 139, *Kahu Illias* v. *N.V. Vereenigde Nederlandsche Scheepvaartmaatschappij* [1961] M.L.J. 275, *Lind* v. *Johnson* [1937] 4 All E.R. 201, *Chua Kim Liang & Anor.* v. *Teo Kim Ngo* [1963] M.L.J. 262, *Liow Sang* v. *Chai Choo Kim & Anor.* [1962] M.L.J. 429 and *Ghulam Hussain* v. *Shaharom & Anor.* [1966] 2 M.L.J. 207.

FEDERAL COURT.

C.S. Wu for the appellants.

D.H. Murphy for the respondent.

Cur. Adv. Vult.

Azmi L.P.: The appellants were defendants in the suit and the respondent was the plaintiff. On 5th January 1962, the plaintiff suffered personal injuries as a result of the negligent driving of the second defendant and he was awarded by the High Court $10,000 general damages for a fracture of the mandible, contusion of bladder with rupture of the tip of the urethera, loss of 2 molar teeth and lacerated wound on the left thigh. The learned judge, however, dismissed plaintiff's claim for damages for alleged impotency resulting from the accident. The respondent cross appealed against this finding.

The first defendant, a mining company, was sued as the employer of the second defendant. Both defendants admitted negligence but alleged that on 5th November 1963, the plaintiff had entered into a memorandum of agreement with the first defendant in compliance with section 28 of the Workmen's Compensation Ordinance 1952, hereinafter referred to as the Ordinance, whereby the first defendant paid to the plaintiff a sum of $292.72 by way of agreed compensation under the Ordinance. He further said that the memorandum of agreement was duly registered by the Commissioner of Workmen's Compensation on

29th April 1965. This memorandum of agreement is Exhibit P.2. In the premises it was agreed that the plaintiff was precluded from claiming common law damages against the first defendant by virtue of the provisions of section 41(1)(b) of the Ordinance and that the plaintiff was further precluded from claiming damages against the 2nd defendant by virtue of the provisions of section 20(a) of the Ordinance.

The plaintiff in joining issue with the defendants stated that the amount of compensation by way of lump sum has never been ascertained by agreement between the plaintiff and the first defendant, and there was therefore no agreement between the two of them within the meaning of section 28 of the Ordinance. He further averred that no compensation whatsoever for the injuries have been received and in reference to the allegation that the plaintiff was precluded from claiming damages under the common law against the two defendants by virtue of the provisions of the various sections in the Ordinance, the plaintiff denied that he did or committed any act or acts under the Ordinance which would bar him from maintaining this and any other action to recover damages in respect of injuries sustained in the accident.

The evidence at the trial would appear to show that whilst the plaintiff was in hospital, the first defendant paid to plaintiff's brother sums of money equal to his normal wages for January, February and March 1962.

On 5th November 1963, the plaintiff signed Exh. P.2 which was in form "O" of the Ordinance. It was, however, not recorded by the Commissioner of Workmen's Compensation until 29th April 1965 — about three years and three months after its execution by the two parties.

It is not very clear what caused this delay. The available correspondence between the Commissioner for Labour and the first defendant would show that the matter was referred to the commissioner on 11th May 1962, and on 20th May 1962 the commissioner informed the first defendant's manager that $292.72 compensation was due to the workman. On 9th April 1962, the commissioner further enquired whether the plaintiff had resumed work and if so the amount of the total compensation already paid to him and whether the final medical certificate was available. He further went on to point out that if the plaintiff was still disabled the first defendant was requested to pay him half monthly payments of $46.71 on every 16th day from the date of the accident until he was certified fit to resume work. The next correspondence dated 5th November 1963 was from the plaintiff informing the Commissioner of Labour that he had received compensation as computed by the commissioner and requested that the memorandum of agreement be recorded. D.8 is a receipt signed by the plaintiff to the effect that he received $292.72 in full satisfaction and discharge of all claims upon the Overseas Assurance Corporation Ltd. but I notice however, that the place for the date of the receipt was left blank.

The learned judge after referring to plaintiff's allegation that the money paid to him through his brother was wages and to the allegation by the first defendant that they were payments towards compensation, found as a fact that the plaintiff was never informed that they were payments towards compensation but he however, went on to say that the plaintiff ought to know that he was not entitled to wages whilst on sick leave. He, however, came to the conclusion that this question was not of vital importance to the determination of the dispute which had arisen.

He then referred to the signing of the memorandum agreement. He came to the conclusion that the plaintiff signed the documents willingly because, he, the plaintiff, believed that he was being paid more than he was entitled. The learned judge came to the conclusion that the plaintiff had in fact been paid compensation under the Ordinance for his disablement.

The learned judge, however, was of the view that all this cannot affect the plaintiff's right to common law action for damages against the first defendant for his injuries.

To understand the learned judge's reasoning it is necessary to refer to the provisions of section 28 and section 41(1)(b) of the Ordinance. Section 28(1) provides that where the amount of the compensation by way of a lump sum has been ascertained by agreement between the workman and his employer, a memorandum shall within 14 days be sent by the employer or the workman to the commissioner, who, on being satisfied as to its genuiness and that the amount of compensation agreed upon is adequate shall, except as provided in the sub-sections of that section, record that memorandum in a register in the prescribed manner.

Section 41(1) of the Ordinance provides that no suit for damages shall be maintainable in any court by a workman against the employer if an agreement has been come to between the workman and the employer and such agreement has been recorded under section 28.

Section 17 of the Ordinance reads as follows:—

> "Any half-monthly payments may, by agreement between the workman and the employer consented to and recorded by the commissioner, or, if the workman and the employer cannot agree or the commissioner does not consent and the payments have been continued for not less than six months, on application to the arbitrator, be commuted into a lump sum to be paid instead of such half-monthly payments of such amount as may be agreed to by the parties and consented to by the commissioner or determined by the arbitrator, as the case may be."

The learned judge was of the view that only a "lump sum agreement" may be recorded under section 28 and he also held that in a lump sum agreement the whole compensation must be paid in one payment. In the circumstances, the agreement P.2 cannot therefore be said to be an agreement envisaged by section 28. Nor could it be said to be an agreement contemplated under section 17. Therefore, its registration by the commissioner could not as a matter of law bring into operation the provisions of section 41(1)(b).

The appellant's grounds of appeal Nos. 1 to 3 are against this finding of law.

I would with respect, say that the learned judge was wrong in thinking that an agreement cannot be recorded under section 28 unless the whole lump sum of compensation has been paid or is to be paid in one single payment. In my view, the word lump sum is used to distinguish it from half monthly payments and a lump sum agreement is an agreement whereby the two parties agreed that the whole compensation due to the workman is assessed at once. Though cited to him the learned judge did not consider *Lind* v. *Johnson.*[1]

The facts of the case would appear to show that the plaintiff, a farm bailiff, was injured in a collision between his employer's van which he was driving and a motor lorry owned by the defendant. The defendant admitted the negligence of his driver but relied upon the Workmen's Compensation Act 1925 section 30 alleging that the plaintiff had received compensation under that Act and was debarred from recovering damages. The plaintiff, was, in fact paid full wages all the time he was off work and made no claim for compensation. Sometime after his return to work, however, he signed the usual form of receipt in respect of each week he was off work, the receipts stating that he had received compensation at the rate of 30s per week. The employer in fact never received from the insurance company any sum in respect of the compensation and the plaintiff received only his full wages as stated above. It was held that the plaintiff had received wages only and not compensation and no question arose under section 30. Plaintiff was therefore entitled to recover in that action.

Section 30 of the English Act of 1925 provides that the workman may take proceedings both against the employer and some person other than the employer under circumstances creating a legal liability in that other person to pay damages in respect of any injury the workman has suffered. Though the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under the Act, he shall not, however, be entitled to recover both compensation and damages.

It was urged therefore before us that on the principle of *Lind* v. *Johnson* since what the plaintiff in the instant case received was in fact wages, and not a lump sum compensation, he would be entitled to recover damages under the common law. I am inclined to this same view and I would therefore dismiss the appeal.

Before I go to the cross-appeal I would like, however, to say something about the provisions of section 17 of the Workmen's Compensation Ordinance. Section 17, as its marginal title says, is a provision for the commutation of half-monthly payments. It provides that any half-monthly payments may by agreement between the workman and the employer and consented to by the commissioner be commuted into a lump sum to be paid instead of such half-monthly payments as agreed by the parties and consented to by the commissioner. But, if the workman and employer cannot agree or the commissioner does not consent, the matter may be referred to the arbitrator provided however, that this can be done only after the half-monthly payments have been continued for not less than six months. With respect the learned judge was therefore wrong when he said in reference to the payment of $292.72 paid to the plaintiff thus:—

> "Nor could it be evidence of an arrangement contemplated in section 17 of the Ordinance as the period of disablement in this case was very much less than six months."

As to the cross-appeal. The cross-appeal is against quantum and also against the finding of the learned judge in holding that it was impossible on the evidence available to conclude that the plaintiff had become impotent as a result of the accident. Dr. Horne was of the view that the plaintiff was impotent for psychological reasons which according to him may well result from the accident. He was of the view that there was nothing wrong with the genital organ except mental control which could be caused by fear and anxiety in this case. The doctor examined the plaintiff twice, once before he made his report on 24th November 1966 and again on 24th September 1967. The accident however took place on 5th January 1962. In his report after saying that there was no obvious abnormality of the plaintiff's genital organs, he however, found on experiment that masturbation was successful to ejaculation, but without full penile erection. He therefore, came to the conclusion that in this case impotence was present, giving his reason in support of his view that generally in young men the cause of impotence is nearly always psychological.

Dr. Bhatal examined the plaintiff on 19th September 1966 and he stated as follows in reference to the plaintiff:—

> "He can pass urine without difficulty — there was no stricture of the urethra present. Physical examination of his body was normal. His penis and testicles are normally developed and pubic and axillary hair is present."

The doctor came to the conclusion that he found nothing to suggest that plaintiff was incapable of sexual intercourse.

I agree with the learned judge that on the evidence I would not say that impotency as a result of the injuries has been proved. I would therefore dismiss the cross-appeal. As to costs the appellants will pay ¾ of the respondent's costs. Deposit of $500 to be paid to respondent towards taxed costs.

Suffian F.J.: I have had the advantage of reading the judgment of the Lord President and of my brother MacIntyre and I too would dismiss this appeal.

The plaintiff, being a "workman", may claim compensation under the Workmen's Compensation Ordinance, 1952 against his employer, the Kepong Mines Ltd., or he may sue it (the first defendant) for damages: these are quite distinct. But as to damages section 41(1)(b) provides:—

". . . . no suit for damages shall be maintainable in any court by a workman against his employer in respect of any injury . . . . if an agreement has been come to between the workman and the employer and such agreement has been recorded under section 28;"

and the employer says that such an agreement has been come to between it and its workman, the plaintiff, the agreement has been recorded under section 28 and therefore the plaintiff cannot maintain a suit against it.

What does section 28 says? Its material part says:—

"(1) Where the amount of compensation by way of a lump sum has been ascertained by agreement between the workman and his employer a memorandum shall, within fourteen days, be sent by the employer . . . . to the commissioner [i.e. of Labour], who [on being satisfied as to certain specified matters] shall . . . . record the memorandum in a register in the prescribed manner."

It is not disputed that an agreement between the employer and its workman (Exhibit P.2) was recorded by the commissioner, but the learned trial judge held that, as the amount of compensation agreed in it was not by way of a lump sum, it was not an agreement that could have been recorded and therefore its appearance on the register was void and did not preclude the plaintiff from suing his employer for damages. I am also of the view that the agreement was not recordable, not for the reason given by the learned trial judge because it appears to me not unreasonable to hold from the terms of the agreement that the amount of compensation stated in it was by way of a lump sum, but because subsection (4) of section 28 provides:—

"An agreement for the payment of compensation which has been recorded under this section shall be enforceable . . . ."

and it has been held by the English Court of Appeal in *Popple* v. *Frodingham Iron & Steel Co.*,[2] a decision on para. 9, Schedule II to the English Workmen's Compensation Act, 1906 (which approximates to our section 28), that what is recordable is an agreement regarding "compensation payable and . . . . not compensation which, as a matter of history, was payable at some past date." The reason for this was that an agreement recorded under the English provision "shall for all purposes . . . . be enforceable". Cozens-Hardy M.R. said at page 144:—

"No execution could properly issue except on the footing that the agreement is still in force. . . . If so, it is quite plain that the registrar must be satisfied that the agreement is a subsisting agreement in this sense, that either at the moment when application to record is made there is, or at some future date there may be, ground for applying . . . . to enforce the memorandum as a judgment."

With respect I am of the opinion that the same principle applies here. I have scrutinized Exhibit P.2 and it is undoubted that when the agreement was recorded by the commissioner nothing remained to be paid under it and therefore it could not have been recorded under section 28 and its appearance on the register being void, the plaintiff is not precluded from suing his employer for damages.

The second defendant is not an employer and his defence is quite distinct from that of the employer. It is admitted that he was negligent and thereby caused the plaintiff injury. By law the plaintiff may sue him for damages and may also claim compensation under the Ordinance against the employer, for section 20(a) provides:—

"Where any injury for which compensation is payable under this Ordinance was caused under circumstances creating a legal liability in some person *other than the employer* to pay damages in respect thereof, the workman may take proceedings against that person to recover damages and may claim against any person liable to pay compensation under this Ordinance, ..."

but the section goes on further to provide:—

"but he shall not be entitled to recover both damages and compensation."

The second defendant says that in fact the plaintiff has recovered compensation from his employer and therefore he cannot now sue the second defendant for damages. I am satisfied for the reasons given by the Lord President that what the plaintiff received from his employer was not compensation but wages and therefore the plaintiff is not precluded from suing the second defendant for damages.

As regards the cross-appeal, that too I agree for the reasons given by the Lord President should be dismissed.

MacIntyre F.J.: I have read the judgment of the learned Lord President and of my brother, Suffian F.J. The only issue in this appeal is whether the sum of $292.72 paid by the appellants to the respondent was paid as compensation under the Workmen's Compensation Ordinance

or as payment to the account of wages. If the sum was paid to account of compensation under the Ordinance and a memorandum of agreement to that effect had been registered with the commissioner under section 28 thereof, then, of course, the respondent would have been barred from prosecuting a suit for damages in court by virtue of the provisions of section 41(1)(b). In the present case, however, it is clear from the memorandum of agreement itself that the sum of $292.72 was, in fact, paid as wages for a period of 49 days during which the respondent was under temporary disablement and that he agreed to accept the amount so paid as compensation. On these facts, it could be hardly said that the payment made was payment under the Workmen's Compensation Ordinance. The facts appear to be on all fours with the facts in *Lind* v. *Johnson* cited by the learned Lord President, with respect, I agree with him that this appeal should be dismissed with costs. I also agree, for the reasons stated by him, that the cross appeal should be dismissed with costs.

Appeal and cross-appeal dismissed.

Solicitors: *Donaldson & Burkinshaw; Murphy & Dunbar.*

WONG IT YONG v. LIM GAW TEONG & ANOR.

[F.C. (Azmi L.P., Suffian and MacIntyre FJ.J.) December 9, 1968]

[Johore Bahru—Federal Court Civil Appeal No. X23 of 1968]

Negligence — Highway — Vicarious liability — Negligence of driver — Car on test — Driver intending purchaser — Whether owner vicariously liable for negligence — Whether driver using car for his own purpose or also for the owner's purpose.

In this case one Daniel who wanted to buy a car asked to be allowed to test the car by using it for one or two days. The owner of the car agreed to let him do so. While driving the car Daniel collided with an oncoming vehicle and it was held that he had been negligent and damages were awarded in favour of the person injured. The question was whether the owner of the car was liable for the negligence of the driver. The learned trial judge held that the owner was vicariously liable for the driver's negligence. On appeal by the car owner,

Held, dismissing the appeal: (1) in this case it was to the advantage of the owner who wanted to sell the car, to allow the intending purchaser to test drive the car for one or two days and therefore when the accident happened the driver was driving the car partly, if not wholly, on the owner's business or for the owner's purposes;

(2) therefore the learned trial judge was correct in holding that the owner was vicariously liable.

Cases referred to:—

(1) *Hewitt* v. *Bonvin & Anor.* [1940] 1 K.B. 188, 191.

(2) *Ormrod's case* [1953] 2 All E.R. 753.

(3) *Norton* v. *Canadian Pacific Steamships Ltd.* [1961] 2 All E.R. 785.

(4) *Lee Chong* v. *Tan Kwee Low & Anor.* [1961] M.L.J. 98.

(5) *Turbervil* v. *Stamp* (1697) Comp. 459.

The following cases were also cited in argument: *Raja Singh* v. *Chin Fatt* [1936] M.L.J. 157, *Kho Kong Seng* v. *Mabbun* [1964] M.L.J. 58, *Hobson* v. *Bartram & Sons Ltd.* [1950] 1 All E.R. 412, 413 and *Smith* v. *General Motor Cab Co. Ltd.* [1911] A.C. 188.

FEDERAL COURT.

Lau Tiong Jin for the appellant.

D.A. Devadason for the respondents.

Cur. Adv. Vult.

Suffian F.J.: Mr. K.R. Daniel, the first defendant, was an officer in charge of the P.W.D. Workshop at Batu Pahat. He wanted to buy a car from Wong It Yong, the second defendant, a lady who helped her father, a motor spare parts dealer, in his business. They agreed on the price of car No. BR 9663. But before completing the deal the first defendant wanted to test the car by using it for one or two days. The second defendant agreed to let him do so.

On 16th June, 1959, at about 11 p.m. the first defendant drove the car towards Kluang. At 1¾ milestone he collided with an oncoming vehicle. The learned trial judge held that he had been negligent and awarded damages in favour of the driver and passenger of the oncoming vehicle.

The learned trial judge also held the second defendant vicariously liable for the first defendant's negligence.

The second defendant appealed.

The only question for decision in this appeal is — is the owner of the car liable on these facts for the first defendant's negligence?

The law applicable was stated by MacKinnon L.J. in *Hewitt* v. *Bonvin & Anor.*[1] as follows:—

"If *A* suffers damage by the wrongful act of *B*, and seeks to say that *C* is liable for that damage, he must establish that in doing the act *B* acted as the agent or servant of *C*. If he says that *B* was *C's* agent, he must further show that *C* authorised the act."

The facts in that case were that a son obtained from his mother, who had authority to grant it, permission to drive his father's motor car. The son wanted the car for his own purposes in order to drive two girl friends home from London to Wisbech. Neither the father nor the mother knew the girls and it was no concern of either of them that the girls should be driven to Wisbech. On the way back, through the negligent driving of the son, the car was upset and a friend who had accompanied the party to Wisbech, was killed. The trial judge held the father liable for the son's negligence, but the Court of Appeal held otherwise. MacKinnon